82-21

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ALEXANDER L. STEVAS,
CLERK

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT M. CARSWELL, JR.,
PETITIONER

v.

JOHN M. MILGRIM,
DENNIS HILL
and
W. H. BERGER, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

ROBERT M. CARSWELL, JR.
1175 Ballantrae Lane
McLean, Virginia 22101
Tel: (703) 356-9296

PETITIONER - Pro se

QUESTIONS PRESENTED FOR REVIEW

1. Where a demurrer filed in the court of first instance admits that the respondents are knowingly, intentionally and without cause or justification abusing their office and power as sanitarians of the county health department for and unlawful and improper purpose, to vex, harass and annoy petitioner, and that court sustains said demurrer with prejudice, denying petitioner a remedy and leaving him subject to the penal clause of the pertinent county code under which respondents purport to act, is this a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, depriving petitioner of his property without due process of law ?

2. If in the above situation the "pertinent county code", with its penal clause, patently fails to provide, with respect to alleged or purported violations of said code, (1) notice to the affected party; (2) a hearing for the affected party; (3) a review of any administrative determination made under said code; and (4) an appeal to a judicial court, does such code violate the due process of law clause of the Fourteenth Amendment to the United States Constitution, so that any action purported to be taken under its authority without (1) notice, (2)

hearing, (3) review, and (4) appeal would be null and void ?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF VIRGINIA

JOHN M. MILGRIM
Sanitarian
Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

DENNIS HILL
Senior Sanitarian
Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

W. H. BERGER
Supervising Sanitarian
Environmental Services Section
Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

An additional party to the underlying suit is interested in this petition, although he was not a party to the Petition for Appeal heard in the Supreme Court of Virginia:

(Defendant) Stephen S. Murray
855 Dolley Madison Boulevard
McLean, Virginia 22101

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AUTHORITIES

Federal cases:

Noval Goss et al v. Eileen Lopez et al. (1975) 419 US 565, 42 Led2d 725, 95 S. Ct. 729.

Mullane v. Central Hanover Trust Co. (1950) 339 US 306, 94 Led 865, 70 S. Ct. 652.

Baldwin v. Hale (1864) 1 Wall 223, 233, 17 Led 531.

Yick Wo v. Hopkins, 118 US 356, 6 S. Ct. 1064, 30 Led 220.

Virginia cases:

Violett's Heirs v. City Council of Alexandria (1896) 92 Va. 561, 23 S.E. 909, 31 LRA 382, 53 Am. St. Rep. 825.

Assaid v. City of Roanoke (1942) 179 Va. 47, 18 S.E.2d 287, at 288.

Thompson v. Smith (1930) 155 Va. 367, 154 S.E. 579, 71 ALR 604.

Texts:

16A CJS Section 568 at page 556.

IN THE

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No. _____

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ROBERT M. CARSWELL, JR.

PETITIONER

v.

JOHN M. MILGRIM,
DENNIS HILL,
and
W. H. BERGER,

RESPONDENTS

- -
- -

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

- -
- -

The petitioner, Robert M. Carswell, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered on March 17, 1982.

OPINION BELOW

On March 17, 1982, the Supreme Court of Virginia entered its opinion refusing petitioner's Petition for Appeal from the order of the Circuit Court of Fairfax County, Virginia, sustaining a demurrer to petitioner's Second Amended Complaint in the underlying case brought before said court. A copy of that opinion is attached as Appendix A.

JURISDICTION

On March 17, 1982, the Supreme Court of Virginia entered judgment refusing petitioner's Petition for Appeal. This is a final judgment on the federal issue. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . . .

ORDINANCE INVOLVED

Chapter 68, Fairfax County Code, Fairfax County, Virginia. Pertinent sections are set forth as Appendix G.

STATEMENT OF THE CASE

The underlying case involves a suit for damages brought by Carswell against respondents in their individual capacities and not as agents, officers and employees of the Commonwealth of Virginia and/or Fairfax County. Two other defendants were also named; the demurrer of Falck was sustained with prejudice; the case against the other had a trial date set but your petitioner moved for a voluntary non-suit at the time when that defendant (Stephen S. Murray) had suffered a heart attack. The suit against Murray has been renewed, the complaint having been filed in the Circuit Court of Fairfax County, Virginia, on June 9, 1982, prior to filing this petition.

Respondents are sanitarians employed at the Fairfax County Health Department. They are being suid for, and by their demurrer admit, abusing the power of their office, while purporting to act for the government of the Commonwealth of Virginia, by intentionally, knowingly and without cause vexing, harassing and annoying Carswell in their unfounded efforts to force him to cease and desist from using the septic system serving his residence in Fairfax County, Virginia; said septic system has never been in malfunction.

Their actions finding said septic system to be in malfunction are taken for an improper and unlawful purpose, to hide their negligence in granting a permit to Defendant Murray (not a respondent in this petition) to relocate and drill a potable water well on his property too close to the drainfields of the septic system serving Carswell's residence. This violated Section 70-1-11 of the Fairfax County Code (Appendix H). Defendant Murray knowingly installed this potable water well in violation of said county code, and then he made an unfounded report to the respondents of a malfunction of the septic system serving Carswell's residence. He is being sued for this act, which directly and foreseeably resulted in the actions of respondents, for which they are also being sued.

Respondents were/are acting under the authority of Chapter 68 of the Fairfax County Code (Appendix G), which formed pages 67-80, inclusive, of the Record on Appeal in the Supreme Court of Virginia. It contains a penalty clause which reads as follows:

> Section 68-1-26. Prosecution.
>
> Whoever violates any provision of this Article, by doing a prohibited act, or failing to perform a required act, or failing to perfomr permitted acts in the prescribed

> manner shall be deemed guilty of a misdemeanor and shall, upon conviction, be punishable by imprisonment not to exceed thirty (3) days or by fine not to exceed One Thousand ($1,000.00) or both. Each day violation of this Article shall continue shall constitute a separate offense.

Respondents' demurrer to Carswell's second amended complaint was sustained with prejudice on April 8, 1981, the court of first instance refusing to accept a suit for "abuse of power". That court did not specifically decide that Carswell's complaint failed to state a cause of action (see Appendix E for the alleged facts admitted by respondents' demurrer - the court's refusal to grant a remedy is astounding under these admissions 1); rather, that court could not find a category of actions in which to place this type of suit. Carswell argued that an administrative process under Chapter 68 was involved, which was admittedly being abused by respondents, and that petitioner was entitled to a remedy as a matter of right, whether that remedy be known as abuse of process, abuse of power, or something else - there would be no magic in the name given to it - and that the court should not deny a remedy because the complaint did not fall into a specific category of actions. Co-counsel for respondents argued that this was a case in which Carswell may have suffered a wrong for which there is no

remedy. This, in effect, is what that court decided.

This Court will observe that there was no denial to Carswell of his constitutional right to due process - to a remedy - until tje court of first instance took the decision to sustain respondents' demurrer. It was at this moment that the denial of his constitutional right matured. The denial of a remedy under the special facts of this case raises a constitutional question per se. It is emphasized that Carswell had raised the issue of his right to a remedy in the court of first instance prior to its decision to sustain respondents' demurrer.

This Court will note from Appendixes C, D and and E that from the moment of first contact with Carswell respondents had determined that the septic system serving his residence was in malfunction - prior to any investigation or analysis of said system ! The outcome was predetermined from the start, from that first contact, with no notice, no hearing, no review, no appeal ! And Chapter 68 under which respondents purport to act makes the sole, subjective determination by the Administrative Authority (respondents) final and unreviewable !

Carswell filed a timely Petition for Ap-

peal in the Supreme Court of Virginia, which was denied after hearing Carswell's oral argument on the constitutional and other matters, on March 17, 1982.

It is this situation which is the basis for this petition for certiorari - a situation of a strikingly patent case of lack of due process which the Supreme Court of Virginia has chosen to ignore rahter than rectify.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Supreme Court of Virginia heard Petitioner's arguments on the constitutional issue relating to Section 11 of the Constitution of Virginia, which reads as follows:

> Section 11 - That no person shall be deprived of his life, liberty or property without due process of law.

and Section 1 of the Fourteenth Amendment to the United States Constitution, quoted herein under the heading "Constitutional Provision Involved". It denied his Petition for Appeal, stating merely that:

> Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

This judgment of the Supreme Court of Virginia is a final decision on the federal question

raised by Carswell in the court of first instance; it is binding on that lower state court and in effect and in fact confirms the judgment of that lower court and leaves Carswell without a remedy in a situation wherein his liberty and property continue to be in jeopardy because of actions taken by respondents under Chapter 68 of the Fairfax County Code (Appendix G). Chapter 68 was before the Supreme Court of Virginia, forming pages 67-80 of the Record on Appeal. The fact that Carswell was plaintiff in the court below should not affect requirements for due process of law - even plaintiffs are entitled to due process of law!

2. Chapter 68 of the Fairfax County Code (Appendix G) patently presents the followinf aspects and elements of unconstitutionality:

a. Article 1 is vague and fails to set out any standards, reasonable or otherwise, with respect to how determinations are to be made that an individual sewage disposal system is malfunctioning. No objective tests are established for that purpose. No criteria are set out for testing or evaluating the testing for the satisfactory operation of a septic system. The term "malfunction" is defined by reference to the "design function" of a system, but no standards

or criteria are set forth for determining this aspect (see Thompson v. Smith, infra). Under the Article the Administrative Authority is free to act as he wishes.

b. Chapter 68 of the Fairfax County Code is criminal in nature - see Section 68-1-26 quoted on page 4 hereof. This Court has been jealous to guard an accused's rights to procedural due process in such cases. Since this codes was enacted long after the septic system was installed on Carswell's property, the application of this section to Carswell raises an issue of ex post facto under Article I, Section 10 of the United States Constitution.

c. The activities and decisions of the Director of Health Services and his duly authorized representatives (respondents) are all entirely subjective in nature. The interested party who will be affected by these activities and decisions has no protection from this subjectiveness (see Thompson v. Smith, infra).

d. The determination made by the Administrative Authority (the Director of Health Services or his duly authorized representative - respondents in this case) is final and unreviewable.

e. This Chapter 68 has no provision

for (1) notice to the affected party; (2) a hearing for the affected party; (3) a review; or (4) judicial review. It is again emphasized that this Chapter is penal in nature, yet it patently fails to provide these four basic elements mentioned - not even one of them - of due process of law (see Assaid v. Roanoke, infra).

f. Finally, this Chapter 68 amounts to an unconstitutional delegation of legislative power to act without notice and hearing to an essentially administrative officer. It fails to declare the policy of the law and to fix the legal principles which are to control the discretion of the Director of Health Services and/or his duly authorized representatives (see Thompson v. Smith, infra).

3. This case, then, involves several constitutional issues of due process. The principle one is that of denial of a remedy to petitioner by the judicial system of Virginia, for the admitted wilfull and malicious abusive acts of respondents, government employees, for an unlawful purpose, interfering with petitioner's quiet enjoyment of his rights and property. Ancillary to this is the lack of due process in the procedures established under Chapter 68 of the Fairfax County Code, which is the basis for the authority under which respondents purport to

act. If respondents have so acted and continue to act under a code provision which is unconstitutional, their acts are unlawful and void, and Carswell's right to recover damages for such acts must be recognized by providing him a remedy in the judicial system of Virginia. In either case of unconstitutionality, Carswell is entitled to a remedy. The government of the Commonwealth of Virginia cannot escape its constitutional obligation to provide due process by saying simply, "there is no remedy"!

4. This Court will observe that Section 1 of the Fourteenth Amendment to the United States Constitution establishes a person's right to due process - and conversely it establishes the government's (the Commonwealth of Virginia in the present case) obligation to provide that due process. This constitutional guarantee of due process of law extends to any department of government, executive, legislative, or judicial, and to every governmental proceding which may interfere with personal or property rights, whether the proceding be legislative, judicial, administrative or executive (16A CJS Section 568 at page 556). Otherwise the due process clause would be a hollow phrase.

5. This Court has invariably struck down

laws that failed to provide the basic elements of due process of law, such as (1) notice, (2) hearing, (3) review, and (4) appeal - which is the situation with Chapter 68 of the Fairfax County Code. In Noval Goss et al. v. Eileen Lopez et al. (1975) 419 US 565, 42 Led2d 725, 95 S.Ct. 729, this Court, citing Mullane v. Central Hanover Trust Co. (1950) 339 US 306, 94 Led 865, 70 S.Ct. 652, as a case often invoked by later opinions, quotes that case as follows:

> . . . many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In Baldwin v. Hale (1864), 1 Wall 223, 233, 17 Led 531, it is stated "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (emphasis added)

In Yick Wo v. Hopkins, 118 US 356, 6. S.Ct. 1064, 30 Led 220, this Court dealt with the question of a delegation of police powers. An ordinance of the city and county of San Francisco provided that it was unlawful for a person to engage in the laundry business "without

having first obtained the consent of the board of supervisors . . . ". In holding the ordinance invalid this Court said:

> The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint... .
>
> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

It is interesting to consider the following Virginia cases, in which the Supreme Court of Virginia consistently struck down codes with the defects discussed above, as violative of both the Virginia and the United States Constitutions.

Violett's Heirs v. City Council of Alexandria (1896) 92 Va. 561, 23 S.E. 909, 31 LRA 382, 53 Am. St. Rep. 825, is a leading case with respect to due process under local statutes and codes. This case involved a local ordinance providing for assessment against land for street improvement, and for the method of evaluating the land. At page 913 (SE Reports) the

Supreme Court of Virginia stated:

> The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done.

And further on that court stated:

> All the authorities agree that "due process of law" requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property.

In the case of Assaid v. City of Roanoke (1942) 179 Va. 47, 18 S.E.2d 287, at 288 (S.E. Reports) the Supreme Court of Virginia quoted Mr. Justice Epes in Thompson v. Smith (1930) 155 Va. 367, 154 S.E.579, 71 ALR 604 as follows:

> It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency.

That court then went on to state :

> It is by this legal tape that the rights of the defendant are measured. When the tape is placed upon the ordinance in question it clearly appear (sic) that it violates Article 1, Section 11 of the Virginia Constitution, and the Fourteenth A-

> mendment to the Constitution of the United States, by reason of its failure to provide for notice and hearing, by undertaking to make the determination of the city manager final and unreviewable, and by not providing for a judicial review thereof. (emphasis added)

And that court then restated the following principle from Violett's Heirs v. City of Alexandria, supra:

> The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done.

6. Certiorari by this Court is necessary und under the peculiar circumstances of this case to prevent a patent and flagrant violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which would result in a travesty on justice. In addition, a decision by this Court now could help avoid future litigation on this matter should Carswell be prosecuted under Secion 68-1-26 of the Fairfax County Code.

This Court's attention is again invited to the circumstances admitted by the demurrer in the underlying case:

The "duly authorized representatives" of the Director of Health Services, all officers, agents and employees of the Commonwealth of Vir-

ginia and/or Fairfax County, have acted intentionally wilfully and maliciously with an improper purpose, misusing and abusing the power and authority of their office to harass, vex and annoy Carswell, and their actions have been taken under a chapter of the county code that is patently unconstitutional for lack of due process because it does not provide for notice, hearing, review or appeal of the subjective determination made by such persons.

CONCLUSION

For the above stated reason petitioner, Robert M. Carswell, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

Robert M. Carswell Jr.

Dated 5 July 1982

ROBERT M. CARSWELL, JR.
Petitioner
Pro se
1175 Ballantrae Lane
McLean, Virginia 22101
Tel: (703) 356-9296

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT M. CARSWELL, JR.,
Plaintiff

vs. AT LAW NO. 51360

STEPHEN S. MURRAY, ET AL,
Defendants

THIS CAUSE CAME ON to be heard on this 8th day of April, 1981, upon the Pleas in Bar and Demurrers filed by Defendants, John M. Milgrim, Dennis Hill and W. H. Berger, and

IT APPEARING TO THE COURT, after reviewing the pleadings, authorities and arguments of the parties in connection with the Pleas in Bar and Demurrers filed February 20, 1981, by Defendants Milgrim, Hill and Berger, that Plaintiff has failed to state a cause of action as to Defendants, Milgrim, Hill and Berger; and

IT FURTHER APPEARING TO THE COURT that Plaintiff had previously been given leave to amend, it is hereby

ADJUDGED, ORDERED and DECREED that the Demurrers filed by Defendants Milgrim, Hill and Berger are sustained and that Plaintiff's Second Amended Complaint for Damages Caused by

Abuse of Power is dismissed, with prejudice, as to Defendants, Milgrim, Hill and Berger.

THIS CAUSE IS CONTINUED.

ENTERED this 8th day of April, 1981.

(signed) Birch Millsap
JUDGE

SEEN AND OBJECTED:

(signed) Robert M. Carswell, Jr.
Robert M. Carswell, Jr.

WE ASK FOR THIS:

(signed) J. Patrick Taves)

David T. Stitt
By: J. Patrick Taves
Assistant Attorney for the County
Co-Counsel for Defendants
Milgrim, Hill and Berger

(signed) Leonard Vance
R. Leonard Vance
Assistant Attorney General
Co-Counsel for Defendants
Milgrim, Hill and Berger

SEEN:

(signed) Roger E. Sanders
Roger Sanders
Counsel for Stephen Murray

A COPY TESTE:
JAMES E. HOOFNAGLE, CLERK
By: (signature illegible)
Deputy Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 17th day of March, 1982.

Robert M. Carswell, Jr, Appellant,

against Record No. 811116
Circuit Court No. L-51360

John M. Milgrim, et al. Appellees.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,
Teste:

Allen L. Lucy, Clerk

By: (signature illegible)
Deputy Clerk

FAIRFAX COUNTY HEALTH DEPARTMENT
Division of Environmental Health
4080 Chain Bridge Road
Fairfax, Virginia 22030 Phone: 691-2201

In cooperation with the
State Department of Health

April 8, 1980

Mr. Robert Carswell
1175 Ballantrae Lane
McLean, Virginia 22101

Re: Malfunctioning Septic System at 1175 Ballantrae Lane, McLean, Va. Tax Map 31-002-32A

Dear Mr. Carswell:

An inspection of the above named property by Mr. John Milgrim, Sanitarian, on April 7, 1980, revealed that the septic field is malfunctioning and overflowing to the ground surface. The entire drainfield appeared to be saturated. This condition is a violation of Chapter 68 of the Fairfax County Code and requires that the septic tank be pumped immediately and as often as necessary to prevent sewage effluent from flowing to ground surface until necessary repairs and/or sanitary sewer connection can be accomplished.

Public sewer is available to your residence and connection thereto is recommended. However, if you wish to pursue the possibility of repairs

to your system the distribution box and septic tank top will need to be uncovered for inspection.

Please contact this office within five (5) days after receipt of this letter and make an appointment to meet our representative at the site to determine what if any repairs are necessary.

Very truly yours,

(signed) W. H. Berger

W. H. Berger, R.S.
Supervising Sanitarian
Environmental Services Section

WHB:JMM:mr

APPENDIX D

FAIRFAX COUNTY HEALTH DEPARTMENT
Division of Environmental Health
4080 Chain Bridge Road
Fairfax, Virginia 22030 Phone: 691-2201

In cooperation with the
State Department of Health

May 14, 1980

Mr. Robert Carswell

1175 Ballantrae Lane

McLean, Virginia 22101

Re: Sewage Disposal System servig 1175 Ballantrae Lane, McLean, Virginia Tax Map 31-1-002-32A

Dear Mr. Carswell:

On May 13, 1980, Mr. Hill, Senior Sanitarian, visited the referenced property at your request to re-evaluate the conditions of the existing septic tank drainfield sewage disposal system.

The inspection revealed that there are two locations in the area of the septic field that show evidence of recent malfunction. These areas were dry on this visit, but, our records do indicate that Mr. John Milgrim, Sanitarian, has observed what appears to be septic effluent standing in the ground surface in these two areas. It is Mr. Hill's opinion, that the drainfield is saturated and can be expected to overflow to ground surface in the previously dis-

cussed areas. These areas are located over the distribution box and at the end of the field.

In his discussion with you at the site, Mr. Hill learned that your septic field had apparently been damaged when the excavation was made for the installation of public sewer on the adjacent property. Mr. Hill feels that four (4) of a possible six (6) septic lines were severed and are no longer in use which would account for the overloaded condition of the remaining two lines that are malfunctioning. We will verify this fact upon inspection of the distribution box when you have it exposed. If this is the case, we can see no feasibly way to reconnect the system for use.

It is our recommendation that you connect the dwelling to the available sanitary sewer. This would be more desirable than installing a new septic field system due to the close proximity of the septic tank to the sewer line (about 20 feet). However, if you wish we will investigate the soil on your property to determine if there is sufficient area available for a new septic field.

Please contact us by June 15, 1980, to advise us as to your decision in this matter. Mean-

while, periodic inspections will be made to determine the frequency of overflow of sewage to the ground surface. If the system should overflow, it will be necessary to have the tank pumped immediately and as often as necessary to prevent this condition.

If we can be of further service please let us know.

Very truly yours,
(signed) W. H. Berger
W. H. Berger, R.S.
Supervising Sanitarian
Environmental Services Section

WHB:DH:mr

APPENDIX E

FAIRFAX COUNTY HEALTH DEPARTMENT
Division of Environmental Health
4080 Chain Bridge Road
Fairfax, Virginia 22030 Phone: 691-2201

In cooperation with the
State Department of Health

June 10, 1980

CERTIFIED MAIL
0085692

Mr. Robert Carswell
1175 Ballantrae Lane
McLean, Virginia 22101

Re: Sewage Disposal Systems at 1175 Ballantrae Lane, McLean, Virginia Tax Map 31-1-002-32A

Dear Mr. Carswell:

This is to confirm the meeting at the subject property between you, Mr. Dennis Hill, Senior Sanitarian, and me on June 5, 1980.

An inspection of the master distribution box revealed sewage back-up to the top of the box. Such a condition is conclusive evidence that the system is no longer functioning properly. In addition, it is obvious from our permit of October 1, 1951, a sketch dated 1975 provided to us by you, and other factors, including your statement to us that portions of the drainfield were severed during the installation of the sanitary sewer and that portions on the system

are on properties owned by others and no longer within your control.

Based on my investigation and other investigations by members of this department, please be advised an approved method of sewage disposal must be provided within sixty (60) days by connecting to the avaliable sanitary sewer or the installation of a subsurface sewage disposal system installed wholly on your property in accordance with Chapter 68 of tne Fairfax County Code.

Enclosed is a copy of Chapter 68. I wish to bring the following sections to your attention:

1. Section 68-1-1 (2) (B); 68-1-1 (3); 68-1-1 (4); 68-1-1 (5)
2. Section 68-1-2 (a); 68-1-2 (b)
3. Section 68-1-3
4. Section 68-1-4 (a)
5. Section 68-1-5 (a)
6. Section 68-1-9; 68-1-9 (a) (3)
7. Section 68-1-16 (a); 68-1-16 (c) (1)
8. Section 68-1-24

After review of the cited code sections, please fell free to contact me should you have any questions or need further information.

Until such time as an approved sewage disposal

system is provided the septic must be pumped as needed to prevent sewage from overflowing to the ground surface.

Very truly yours,

W. H. Berger, R.S.
Supervising Sanitarian
Environmental Services Section

Enclosure: Chapter 68

WHB:mr

APPENDIX F

Facts admitted by Demurrer
in underlying case

The following is set out in pages and of the Record on Appeal in the Supreme Court of Virginia:

a. Defendant Murray relocated and installed a potable water well on his lot 32-D too close to Carswell's septic drainfield, in violation of Section 70-1-11 of the Fairfax County Code.

b. Defendant Murray did this knowingly.

c. Defendants Milgrim and Berger approved this well relocation.

d. Milgrim and Berger knew or should have known from records in the Fairfax County Health Department that this relocation was in violation of Section 70-1-11 of the Fairfax County Code.

e. Milgrim and Berger were negligent in so approving this well location in violation of the Fairfax County Code, as stated.

f. Murray made the initial report to the Fairfax County Health Department of an alleged malfunction of Carswell's septic system.

g. Murray's report was unfounded and he knew it was unfounded.

h. Milgrim also knew this report was unfounded.

i. Milgrim, Hill and Berger abused their

power and authority as officers, employees and agents of Fairfax County and/or the Commonwealth of Virginia.

j. They did this intentionally, knowingly, and without cause.

k. These same persons misused the power and authority of the Fairfax County Health Department to harass, vex and annoy Carswell.

l. They did this knowingly, intentionally, and without justification.

m. These same persons made various on-site visits to Carswell's septic system location.

n. These same persons made apparent "tests" and probings in the soil of Carswell's land.

o. These "tests" were unscientific.

p. These persons caused Carswell to expend monies to have the septic tank of his system pumped out, and to have the distribution box uncovered and then recovered.

q. These same persons caused Carswell to lose time and/or income from his private practice, including loss of clients.

r. These same persons sent Carswell communications requiring him to take certain actions.

s. These communications were unjustified.

t. The allegations admitted, as set forth in items h. through s. above were all part of the efforts by those three defendants to force Carswell to cease and desist from using the septic

system serving his residence.

u. The allegations admitted as set out in items h. through t. above have been commited and are being committed by these three defendants under color of their office for an unlawful and improper purpose

v. Said unlawful and improper purpose is to hide the negligence of Milgrim and Berger in granting Defendant Murray the permit to relocate the potable water well (items a. through e. above) in violation of Section 70-1-11 of the Fairfax County Code.

APPENDIX G

Chapter 68, Fairfax County Code (pertinent sections only are submitted due to the length of this ordinance and the immateriality of so many sections to the case at bar).

ARTICLE 1

Individual Sewage Disposal Facilities

Section 68-1-1. Definitions

(a) For the purposes of this Article, the following words and phrases shall have the meanings respectively ascribed to them by this Section:

(1) Administrative Authority shall mean the Director of Health Services or his duly authorized representative.

(2) An approved method of disposal of sewage shall mean:

(B) Water carriage disposal to an approved individual sewage disposal system;

(3) Individual sewage disposal system shall mean a complete system for collection, treatment and disposal of sewage which is not part of or connected to a sewage treatment works.

(4) Installed, repaired, approved and standard shall be construed to mean "in accordance with the specifications and standards established within this Article."

(5) Malfunction shall mean when an individual sewage disposal system no longer performs its design function including but not limited to events when effluent surfaces or backs up into the building sewer line.

Section 68-1-2 Approved method of disposal of sanitary sewage required for all houses, public buildings, etc.

(a) It is unlawful for any person to use or occupy, or allow to be used or occupied, any house . . . or other structure used for human habitation . . . unless or until such house . . . is supplied or equipped with a method of disposal of sewage approved by the Administrative Authority.

(b) It is unlawful for any person to replace or repair, or allow to be replaced or repaired, any individual sewage disposal system or any part thereof in any manner to improve its operating condition when it has become malfunctioning or insanitary unless such replacement or repair is approved by the Administrative Authority.

Section 68-1-3. Unlawful to discharge sewage to surface.

It is unlawful for any person to permit or allow the discharge of sewage to . . . ground

surface.

Section 68-1-4. Inspection of individual sewage disposal systems by Administrative Authority.

(a) The Administrative Authority is hereby authorized to inspect any individual sewage disposal system maintained on any premises in the County ... for the purpose of ascertaining whether or not such systems are operating satisfactorily. If any such system is found to be malfunctioning, the Administrative Authority shall notify the owners of the premises served thereby to comply with the provisions of Section 68-1-2.

(b) If any person refuses to allow the Administrative Authority to enter the premises ... where any individual system of sewage disposal is maintained ..., the Administrative Authority may proceed after abtaining a search warrant.

Section 68-1-5. Permit required for individual sewage disposal systems.

(a) It is unlawful for any person to install or repair, or allow to be installed or repaired, an individual sewage disposal system or any part thereof without first making application to and obtaining a permit from the Administrative Authority for an individual sewage disposal system.

Section 68-1-24. Use of individual sewage disposal systems ... after same have become malfunctioning or insanitary.

It shall be unlawful for any person ... to use or allow to be used any premises having an individual sewage disposal system ... for the disposal of human excrement after the system ... has become malfunctioning or insanitary.

Section 68-1-26. Prosecution.

Whoever violates any provision of this Article, by doing a prohibited act, or failing to perfomr a required act, or failing to perform permitted acts in the prescribed manner shall be deemed guilty of a misdemeanor and shall, upon conviction, be punishable by imprisonment not to exceed thirty (30) days or by fine not to exceed One Thousand Dollars ($1,000.00) or both. Each day violation of this Article shall continue shall constitute a separate offense.

APPENDIX H

Chapter 70 of the Fairfax County Code - only the pertinent provision, Section 70-1-11, is set forth for purposes of the case at bar.

Section 70-1-11. Site regulations.

(a) All water supplies shall conform with the following general principles regarding site:

(5) All wells ... shall be located at a minimum distance from sources of pollution as set forth in Table I.

Table I

Minumum Safe Distances

Sources of Pollution	Minimum distance (feet)
	Deep wells
Absorption field	100#

The horizontal separation between the sewage absorption system and a deep well may be reduced to fifty feet only when the surface soil or subsoil receiving the sewage is effectively separated from the water supply formation by an extensive continuous impervious strata of clay, hardpan, rock, etc. Also, the well construction shall be such as to exclude surface water and sewage as effectively as did the undisturbed overlying impervious formation.

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-21

ROBERT M. CARSWELL, JR.
Petitioner,

v.

JOHN M. MILGRIM,
DENNIS HILL
and
W. H. BERGER
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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August 6, 1982

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-21

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JOHN M. MILGRIM,

DENNIS HILL

and

W. H. BERGER

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondents John M. Milgrim, Dennis Hill and W. H. Berger, by and through their counsel, respectfully request that this Honorable Court deny the petition for writ of certiorari seeking review of the ruling of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The order of the Circuit Court of Fairfax County, Virginia, is printed as Appendix A hereto.

The order of the Supreme Court of Virginia is printed as Appendix B hereto.

JURISDICTION

On March 17, 1982, the Supreme Court of Virginia entered judgment refusing petitioner's Petition for Appeal.

Despite the fact that petitioner seeks certiorari review of a decision of the Supreme Court of Virginia, petitioner seeks to invoke the jurisdiction of this Court under Title 28, United States Code § 1254 (Petition for Writ of Certiorari, p. 2). It is respectfully submitted that this Court has no jurisdiction under Title 28, United States Code § 1254 to review a decision of the Supreme Court of Virginia since the statutory jurisdiction invoked by petitioner only allows this Court to review decisions of federal appellate courts.

CONSTITUTIONAL PROVISION INVOLVED

Respondents respectfully submit that no constitutional issues were properly brought before either the

Circuit Court of Fairfax County, Virginia, or the Supreme Court of Virginia by the petitioner.

STATEMENT OF THE CASE

Petitioner, Robert M. Carswell, Jr., filed a "Complaint for Damages Caused by Abuse of Power" on November 24, 1980, seeking $20,000 in damages from John M. Milgrim, Dennis Hill and W. H. Berger, employees of the Fairfax County Health Department, for certain actions they allegedly had taken with regard to Carswell after they had granted Stephen S. Murray a potable water well permit. Murray, a private citizen, and Nancy K. Falck, a member of the Board of Supervisors of Fairfax County, were also joined as parties defendant in Carswell's suit.

On December 19, 1980, defendant Murray filed a demurrer, which was overruled by an order entered January 23, 1981. Defendant Murray filed an answer to Carswell's "Complaint" on January 26, 1981.[1/]

Milgrim, Hill and Berger jointly interposed a demurrer to Carswell's "Complaint" and subsequently

---

[1/] Carswell non-suited his claim against Murray and renewed his suit against Murray on June 9, 1982, prior to filing his petition with this Court. (See Petition for Writ of Certiorari, p. 2).

Carswell's suit was dismissed as to defendant Falck by an order entered March 23, 1981, a ruling which is not now challenged by Carswell.

filed an amended demurrer and plea in bar on December 23, 1980. The amended demurrer of Milgrim, Hill and Berger was sustained by an order entered February 23, 1981, which also granted Carswell leave to amend his "Complaint" as to those defendants. Carswell filed a "Second Amended Complaint for Damages Caused by Abuse of Power" on January 30, 1981.[2/] Milgrim, Hill and Berger jointly filed a demurrer and plea in bar to Carswell's "Second Amended Complaint" on February 20, 1981. This demurrer of Milgrim, Hill and Berger was based upon several grounds: 1) The defendants were immune from tort suits due to sovereign immunity; 2) Carswell failed to allege compliance with mandatory claims procedures set out in the Virginia Code for employees of the Commonwealth; 3) The "Second Amended Complaint" failed to clearly inform the defendants of the true nature of Carswell's claim; 4) Carswell's allegations did not state a cause of action in that he had not alleged that the defendants had tortiously inflicted any physical injury upon his person or property; 5) Carswell's suit sought damages for mental and emotional distress without alleging any physical injury and without complying with the requirements set forth in Womack v. Eldridge, 215 Va. 338,

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[2/] Carswell's "Second Amended Complaint" is printed as Appendix C hereto.

210 S.E.2d 145, 148 (1974); and 6) Milgrim, Hill and Berger owed no legal duty to Carswell.[3/] This jointly filed demurrer of Milgrim, Hill and Berger was sustained in its entirety and Carswell's "Second Amended Complaint" was dismissed by an order entered on April 8, 1981, by the Circuit Court of Fairfax County, Virginia, Judge Burch Millsap presiding.

Carswell filed a Petition for Appeal with the Supreme Court challenging the April 8, 1981, ruling of the Circuit Court.

On March 17, 1982, the Supreme Court refused Carswell's Petition for Appeal, and he subsequently filed his Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1254 TO REVIEW A JUDGMENT OF THE SUPREME COURT OF VIRGINIA.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254. (Petition for Writ of Certiorari, p. 2).

It is respectfully submitted that this Court has no jurisdiction under 28 U.S.C. § 1254 to review a judgment of the Supreme Court of Virginia since that provision

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[3/] The jointly filed demurrer of Milgrim, Hill and Berger is printed as Appendix D hereto.

only grants this Court jurisdiction to review decisions of the federal courts of appeals.

II. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PROPERLY DRAW INTO QUESTION THE VALIDITY OF ANY STATE STATUTES OR COUNTY ORDINANCES NOR DOES IT SPECIALLY SET UP OR CLAIM A TITLE, RIGHT, PRIVILEGE OR IMMUNITY UNDER THE CONSTITUTION OF THE UNITED STATES.

The suit filed by Carswell in the Circuit Court of Fairfax County, Virginia, was simply a suit for damages based on Virginia law. Carswell's pleadings in the lower court make no mention of any constitutional right which allegedly has been violated or of a statute or ordinance which was claimed to be unconstitutional. (Appendix C). The Circuit Court of Fairfax County dismissed Carswell's suit, relying on numerous arguments based on Virginia law raised by Milgrim, Hill and Berger in their jointly filed demurrer. The court below found that based on Virginia law, Carswell's pleadings failed to state a cause of action. (Appendix A).

In his Petition for Appeal filed with the Supreme Court of Virginia, Carswell claimed for the first time that he had been denied due process of law. Such arguments had not been raised in the lower court and were not supported by the record. The Supreme Court of Virginia will not, on an inadequate record, entertain

such arguments for the first time on appeal. Newlon v. City of Alexandria, 213 Va. 336, 193 S.E.2d 6 (1972).

Assuming, arguendo, that the petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257, his petition still should be denied. Under 28 U.S.C. § 1257, this Court has jurisdiction to review a judgment of the Supreme Court of Virginia "[b]y writ of certiorari...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution...of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution...of...the United States."

The federal questions petitioner now seeks to have adjudicated by this Court were not raised in the Fairfax County Circuit Court and, since they were not properly before the Supreme Court of Virginia, could not have been decided by that court. Accordingly, petitioner has not properly "drawn in question" any state statute or county ordinance and has not "specially set up or claimed" a title, right, privilege or immunity under the Constitution of the United States.

This Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Upon application to this Court for review of a state court judgment, it is the petitioner's burden to show affirmatively that this Court has jurisdiction.

Gorman v. Washington University, 316 U.S. 98, reh'g denied 316 U.S. 711 (1942). In the case at bar it is clear that the petitioner has not met his burden of showing affirmatively that this Court has jurisdiction.

III. THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA IS BASED ON NONFEDERAL GROUNDS ADEQUATE TO SUPPORT THE JUDGMENT.

It was the judgment of the Circuit Court of Fairfax County that Carswell's pleadings failed to state a cause of action under Virginia law. Carswell has attempted to continue this legal controversy by representing to this Court that such ruling was a denial of due process and that various Fairfax County ordinances are unconstitutional. (Petition for Writ of Certiorari, pp. i and 6).

The jointly filed demurrer of Milgrim, Hill and Berger, which was sustained by the court below to dismiss Carswell's suit, raised numerous grounds, each of which were sustained when the court ruled that Carswell had failed to state a cause of action. (Appendices A and D).[4/]

The only relief requested by Carswell from the defendants was monetary damages. Implicit in

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[4/] It should be noted that Carswell had been given leave to amend his "Complaint" prior to the Circuit Court's final ruling in this matter. (Appendix A).

Carswell's petition is the assertion that the failure of Virginia law to provide him with monetary reparations is a violation of his constitutional rights. Such an assertion is without merit, and the Supreme Court of Virginia's conclusion that Carswell had not stated a cause of action is clearly a ruling on nonfederal grounds adequate to support the judgment that no cause of action had been stated in the pleadings.

This Court has stated consistently that it will not review a state court judgment based upon an adequate and independent state ground. Murdock v. Memphis, 20 Wall. 590, 636 (1875); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). In the case at bar, each of the grounds stated in the demurrer sustained by the Fairfax County Circuit Court is adequate to support the judgments of the courts below. (Appendix D).

IV. PETITIONER NEVER RAISED QUESTION PRESENTED #2 BEFORE THE SUPREME COURT OF VIRGINIA.

Petitioner's only assignment of error before the Supreme Court of Virginia was stated as follows:

> Carswell objected to the order sustaining the demurrer with prejudice (8 April 1981), thus assigning this order as error and preserving his right to appeal this error. The lower court erred in sustaining that demurrer.

The "Questions Involved" stated by petitioner to the Supreme Court of Virginia were:

> 1. Does the complaint state a cause of action against Milgrim, Hill and Berger?
>
> 2. Has Carswell been denied due process of law by the lower court's sustaining the demurrer in question?

It is clear that Question Presented #2 as stated to this Court by petitioner was never an issue cognizable by the Supreme Court of Virginia. Rule 5:21 of the Rules of the Supreme Court of Virginia provides, in pertinent part, that "[o]nly errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below."

Since the issues raised by petitioner in his Question Presented #2 were never raised before the courts below, he is now precluded from raising such issues before this Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Hill v. California, 401 U.S. 797, 805 (1971).

V. THE PETITION DOES NOT RAISE ANY IMPORTANT ISSUES AND AN ADJUDICATION BY THIS COURT WOULD NOT AFFECT ANYONE BUT THE PARTIES IN THIS CASE.

Notwithstanding the jurisdictional arguments set forth previously, it is clear that the petition for writ of certiorari does not raise any new or important issues

which would warrant consideration by this Court. Furthermore, it should be noted that an adjudication of the issues raised by the petitioner would not affect anyone but the parties in this case.

Respondents do not intend to present any arguments regarding the substantive merits of the petition for writ of certiorari unless they are requested to do so by this Court.

CONCLUSION

Respondents pray that this Honorable Court deny petitioner's Petition for Writ of Certiorari on the grounds heretofore stated.

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Attorney General

DAVID T. STITT
County Attorney

CYNTHIA V. BAILEY
Assistant Attorney General

J. PATRICK TAVES
Assistant County Attorney
4100 Chain Bridge Road
Fairfax Virginia 22030
Telephone: (703)691-2421
Counsel of Record for Respondents

August 6, 1982

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT M. CARSWELL, Jr.,
Plaintiff

vs. AT LAW NO. 51360

STEPHEN S. MURRAY, ET AL,
Defendants.

THIS CAUSE CAME ON to be heard on this 8th day of April, 1981, upon the Pleas in Bar and Demurrers filed by Defendants, John M. Milgrim, Dennis Hill and W. H. Berger, and

IT APPEARING TO THE COURT, after reviewing the pleadings authorities and arguments of the parties in connection with the Pleas in Bar and Demurrers filed February 20, 1981, by Defendants, Milgrim, Hill and Berger, that Plaintiff has failed to state a cause of action as to Defendants, Milgrim, Hill and Berger; and

IT FURTHER APPEARING TO THE COURT that Plaintiff had previously been given leave to amend, it is hereby

ADJUDGED, ORDERED and DECREED that the Demurrers filed by Defendants Milgrim, Hill and Berger are sustained and that Plaintiff's Second Amended Complaint for Damages Caused by Abuse of Power is dismissed, with prejudice, as to Defendants, Milgrim, Hill and Berger.

THIS CAUSE IS CONTINUED.

ENTERED this 8th day of April, 1981.

/s/
Burch Millsap, Judge

SEEN AND OBJECTED:

/s/
Robert M. Carsell, Jr.

WE ASK FOR THIS:

/s/
David T. Stitt
By: J. Patrick Taves
Assistant Attorney for the County
Co-Counsel for Defendants
Milgrim, Hill and Berger

/s/
R. Leondard Vance
Assistant Attorney General
Co-Counsel for Defendants
Milgrim, Hill and Berger

SEEN:

/s/
Roger Sanders
Counsel for Stephen Murray

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday ths 17th day of March, 1982.

Robert M. Carswell, Jr., Appellant,

against Record No. 811116
Circuit Court No. L-51360

John M. Milgrim, et al., Appellees.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT M. CARSWELL, Jr.
1175 Ballantrae Lane
McLean, Virginia 22101

Plaintiff

v.

STEPHEN S. MURRAY
855 Dolley Madison Boulevard
McLean, Virginia 22101

JOHN M. MILGRIM
c/o Fairfax Co. Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

LAW # 51360

DENNIS HILL
c/o Fairfax Co. Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

W. H. BERGER, R.S.
c/o Fairfax Co. Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

Mrs. NANCY K. FALCK, Supervisor
1437 Balls Hill Road
McLean, Virginia 22101

Defendants

SECOND AMENDED
COMPLAINT FOR DAMAGES CAUSED BY ABUSE OF POWER

Plaintiff respectfully states to the Court the following:

1. Plaintiff is and has been a resident of Fairfax County since May 1962. His present address, since April 1972, is 1175 Ballantrae Lane, McLean, Virginia 22101, where his residence is located.

2. Defendant MURRAY, apparently a land developer t/a McLean Builders, an unregistered fictitious name, is aresident (sic) of Fairfax County since at least 1976, and he now resides at 855 Dolley Madison Boulevard, McLean, Virginia 22101; Defendants MILGRIM, HILL and BERGER are all officers, employees and agents of the Commonwealth of Virginia and/or Fairfax County, as follows - MILGRIM is a sanitarian employed at the Fairfax County Health Department; HILL is a senior sanitarian employed at the Fairfax County Health Department; and BERGER is a senior sanitarian with the title of Supervising Sanitarian, Environmental Services Section, Fairfax County Health Department.

3. Defendant MURRAY, who knowingly installed a potable water well mentioned in the following paragraph in violation of Section 70-1-11 of the Fairfax County Code with the approval of Defendants MILGRIM and BERGER, did knowingly procure, aid and abet and participate in the act constituting abuse herein sued upon in that, on or about 26 March 1980 he, in concert with Defendant MILGRIM, made the initial unfounded complaint to the Fairfax County Health Department of an alleged malfunction of the septic system serving Plaintiff's residence at the address stated above.

4. On or about 7 April 1980 and thereafter, Defendants MILGRIM, HILL and BERGER intentionally, unlawfully, wrongfully and without cause, and for an improper purpose, and by wilful and intentional abuse of their authority and power as officers, employees and agents of Fairfax County and/or the Commonwealth of Virginia did knowingly misuse the power and authority of the Health Department of said County in that without justification and solely on the basis of Defendant MURRAY's unfounded complaint mentioned in Paragraph 3 above, they vexed, harrassed and annoyed Plaintiff by (a) at various times visiting the site of the septic system serving his residence, by (b) making apparent but unscientific "tests" and probings in the soil of Plantiff's land, by (c) causing him to expend monies to have the septic tank pumped out and to have the distribution box of said septic system dug out and uncovered and then filled in and covered, by (d) causing him to lose time and/or income from his domestic and international law practice, including loss of various prospective clients whose cases he could not accept because of the time he has had to expend on the defense of his rights and interests from this abuse of power by said Defendants, including being present at the activities of the Defendants mentioned herein and at meetings with Defendants HILL and MILGRIM and Defendants HILL and BERGER, and by (e) sending him unjustified communications requiring that Plaintiff take

certain actions; all based on their unfounded and unproven claim that Plaintiff's septic system was and is in malfunction, all as part of their efforts to force Plaintiff, without cause in fact and without justification to cease and desist from using said septic system serving his residence; and said Defendants have committed and are committing all these acts under color of their office for the unlawful and improper purpose of hiding the negligent act of Defendants MILGRIM and BERGER in granting to Defendant MURRAY a permit in October 1979 to relocate a potable water well, denominated as "Well #1" in the official records of the Fairfax County Health Department, on his Lot 32-D adjoining Plaintiff's septic drainfields at a point known to Defendant MURRAY to be closer to said drainfields at a point known to Defendant MURRAY to be closer to said drainfileds than is permitted by Section 70-1-11 of the Code of Fairfax County and by the express terms of the permit itself, which fact Defendants MILGRIM, HILL and BERGER knew or should have known from documents reposing in the official records of the Fairfax County Health Department.

5. Plaintiff wrote to Defendant FALCK on 23 June 1980, fully informing her of the acts of Defendants MURRAY, MILGRIM, HILL and BERGER and requesting her assistance in finding a satisfactory solution to the situation created by these acts. On 2 July 1980 the full merits of Plaintiff's case were discussed at

a meeting in Defendant FALCK's office, at which Defendants HILL and BERGER were also present. At this meeting Defendant FALCK was asked to act on the merits, based on the facts presented, and to correct the unjust and unwarranted actions taken by Defendants MILGRIM, HILL and BERGER. No reply having been received, Plaintiff again wrote to Defendant FALCK on 19 August 1980 concerning this same matter. He received a reply signed by Defendant FALCK dated 3 October 1980, adhering to and accepting the position of Defendants MILGRIM, HILL and BERGER. Plaintiff again wrote to Defendant FALCK on 7 October 1980 concerning this matter, and received a reply signed by said Defendant dated 9 October 1980, in which said Defendant adhered to and accepted the position of the three Defendants, HILL, MILGRIM and BERGER. Defendant FALCK did by her letters of 3 and 9 October 1980, respectively, adopt and ratify the acts of the other Defendants herein complained of.

6. As a result of the said acts of the five (5) Defendants named herein, Plaintiff has suffered damages such as but not limited to (1) out of pocket payments relating to the septic tank and the distribution box work required by Defendants; (2) filing and service fees of this case, and expenses for copies of documents, postage and transportation; (3) time and/or income lost from the Plaintiff's private practice of domestic and international law in preparing this case

from 7 April 1980, and in court appearances; (4) loss of clients due to the time required by this case in defending his rights and interests; (5) and special damages arising from the vexation, harrassment and annoyance and inconveniences caused by Defendants in their efforts as described above. The damages herein indicated and claimed for against the Defendants, jointly and severally, amount to $5,000 (Five Thousand Dollars).

7. All of the Defendants, jointly and severally, by the actions above stated have caused Plaintiff humiliation, anxiety and mental pain and suffering, placing him in a false light before his neighbors in a prestigious neighborhood, thereby injurying Plaintiff in his good name and reputation, by reason whereof Plaintiff demands exemplary and punitive damages in the sum of $15,000 (Fifteen Thousand Dollars).

WHEREFORE Plaintiff prays for judgment in the sum of $20,000 (Twenty Thousand Dollars) against the Defendants jointly and severally, together with Court costs, and for such other relief as to the Court may seem just.

/s/
ROBERT M. CARSWELL, JR.
Plaintiff - Pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Second Amended Complaint was mailed, postage prepaid, to Roger Sanders, Esq., Counsel for Stephen Murray, 6870 Elm Street, Suite 200, McLean, Virginia 22101, and to J. Patrick Taves, Esq., Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, this 30th day of January 1981, as Counsel for Mrs. Nancy K. Falck.

/s/
ROBERT M. CARSWELL, JR.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT M. CARSWELL, JR.	:	
	:	
Plaintiff	:	
	:	
v.	:	AT LAW NO.
	:	51360
	:	
STEPHEN S. MURRAY, et al.	:	
	:	
Defendants.	:	

PLEA IN BAR

COMES NOW defendants John M. Milgrim, Dennis Hill and W. H. Berger, by counsel, and plea in bar to the Second Amended Complaint for Damages Caused by Abuse of Power on the following grounds:

1. The Fairfax County Health Department is operated under a contract with the State Board of Health.

2. Every employee of the Fairfax County Health Department is an employee of the Commonwealth of Virginia. See Va. Code § 32.1-31(E) (Repl. Vol. 1979).

3. Defendants Milgrim, Hill and Berger, employees of the Commonwealth, are immune from liability in tort suits under the doctrine of sovereign immunity.

4. Plaintiff has not complied with the mandatory claims procedure set forth in Va. Code §§ 2.1-223.1 (Repl. Vol. 1979), et seq., and Va. Code §§ 8.01-192, et seq. (Repl. Vol. 1977) for employees of the Commonwealth.

DEMURRER

COMES NOW defendants John M. Milgrim, Dennis Hill and W. H. Berger, by counsel, and demur to plaintiff's Second Amended Complaint for Damages Caused by Abuse of Power on the following grounds:

1. Defendants Milgrim, Hill, and Berger, employees of the Commonwealth, are immune from suits for torts under the doctrime of sovereign immunity.

2. Plaintiff fails to allege compliance with the mandatory claims procedure set forth in Va. Code §§ 2.1-223.1, et seq. (Repl. Vol. 1979), and Va. Code 8.01-192, et seq. (Repl. Vol. 1977), for employees of the Commonwealth.

3. The Second Amended Complaint is insufficient in that it does not clearly inform defendants Milgrim, Hill and Berger of the true nature of plaintiff's claim. Rule 1:4(d).

4. Plaintiff's Second Amended Complaint fails to state a cause of action as to defendants Milgrim, Hill and Berger. The Second Amended Complaint is deficient in that there is no allegation that defendants Milgrim, Hill and Berger tortiously inflicted any physical injury upon plaintiff's person or property.

5. Furthermore, the Second Amended Complaint appears to seek damages for mental and emotional distress without any physical injury being alleged. In order for a cause of action to lie for such distress, four elements must be shown: (1) The wrongdoer's conduct

must be intentional or reckless; (2) The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) There must be a causal connection between the wrongdoer's conduct and the emotional distress; and (4) The emotional distress must be severe. Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974). The Second Amended Complaint fails to state facts against defendants Milgrim, Hill and Berger which would satisfy the four elements set forth in Womack.

6. Defendants Milgrim, Hill and Berger owed no legal duty to plaintiff.

Respectfully submitted,

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W. H. Berger

By /s/
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Robert M. Carswell, Jr., Plaintiff, 1175 Ballantrae Lane, McLean, Virginia 22101 and to Roger Sanders, Esquire, Counsel for Stephen Murray, 6870 Elm Street, Suite 200, McLean, Virginia 22101, this 20th day of February, 1981.

/s/
J. Patrick Taves